BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KELLY COTTON Claimant VS. **SUBCONTRACTORS, INC.** Respondent AND **BUILDERS' ASSN. SELF-INSURERS FUND OF KANSAS** Insurance Carrier	)	Docket No. 1,010,471

ORDER

Respondent requested review of the August 15, 2003 preliminary hearing Order entered by Administrative Law Judge (ALJ) Jon L. Frobish.

ISSUES

Respondent claims the ALJ erred in finding claimant met with personal injury by accident and that the accidental injury arose out of and in the course of his employment with respondent. Respondent further claims the ALJ erred in concluding claimant gave timely notice regarding the accident as required by K.S.A. 44-520.

Claimant maintains the ALJ's Order should be affirmed as it is based upon the ALJ's evaluation of the credibility of those who testified at the preliminary hearing and as such, is not properly the subject of an interlocutory appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant began working for respondent in mid-December 2002 as a brick layer. On February 14, 2003, claimant alleges he began experiencing "sharp pains" around his mid-

back area and radiating into his legs. Claimant testified that he had suffered from "sore backs" before but none as intense as that he experienced on February 14, 2003. On that date or possibly the next, claimant left work early. Before leaving, he informed D.L. Skinner, his foreman, of his back pain and that he needed to see a physician. Claimant neither requested respondent send him to a physician nor did he specifically state his back problems were attributable to his work. Mr. Skinner testified that claimant expressed a concern about utilizing a workers compensation doctor and preferred to utilize his private insurance through the union. Mr. Skinner agreed to let him leave to go see a doctor.

Claimant sought treatment with his private physician, Dr. Rebecca Jordan. He attributed his injury to his employment, specifically advising her that his job required him to repetitively bend over while laying bricks. She took him off work for a few days. Although he returned to work on a sporadic basis, claimant continued to receive treatment from Dr. Jordan.

On or about April 2, 2003, claimant left for Colorado to tend to family business. When he returned to the work site, approximately a week later, claimant presented a work release slip from Dr. Jordan which indicated he was unable to work from April 2 until July 1, 2003. Claimant also presented some disability insurance paperwork. He wanted to have the paperwork completed so that he would be relieved of the financial obligation on his truck. It was at this time that claimant first articulated the connection between work and his back problems. Both Mr. Skinner and Terry L. Davis, another one of claimant's foreman, testified that mid-April was the first time they had been informed that claimant was alleging his back complaints were attributable to his work activities.

The ALJ stated:

> By my count, basically, from the testimony that I have heard, 2-14 is when he either hurt himself or noticed the pain or whatever. And mid April he testified that he [respondent] had gotten notice of it. That's 60 days, by my count. Which I think on a repetitive-use injury or even a traumatic event, with as screwed up as this was, I would probably find notice within 75 days. I don't see where he hurt himself anywhere else. So I find if compensable.[1]

The Board has the jurisdiction to decide this appeal by virtue of K.S.A. 44-534a(a)(2) which states in pertinent part:

> A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given . . . shall be considered jurisdictional, and subject to review by the board.

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[1] P.H. Trans. at 46.

After reviewing the preliminary hearing transcript and the exhibits offered during the proceeding, the Board finds no reason to disturb the ALJ's findings. The claimant alleges a repetitive injury rather than any acute onset of symptoms. The evidence indicates that he worked until February 14, 2003, and sporadically after that in his job as a brick layer. Although claimant may have not specifically articulated the cause of his injury to respondent until mid-April, respondent nevertheless knew of claimant's back complaints as of February 14, 2003. The ALJ determined there was good cause for the delay in reporting the injury. The Board agrees and affirms the ALJ's Order.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Jon L. Frobish dated August 15, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September 2003.

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BOARD MEMBER

c: Ryan E. Hodge, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director